In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 281

WING WA LEE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is a native and citizen of China, born in Shanghai (R. 25). He claims to have fled from Communist China to Hong Kong, where he lived from 1948 until 1953, when he was deported to Macao by British authorities. He returned to Hong Kong in 1954, and in 1958 went to sea under seaman's papers issued by Hong Kong authorities. His wife and four children live in Macao (R. 39-42).

On September 30, 1962, petitioner entered the United States as a non-immigrant crewman, authorized to remain for no more than 29 days. He deserted his ship and remained in this country (R. 33). On May 6, 1963, he was ordered deported to the Republic of China (Formosa) or to Macao. When neither government proved willing to accept him, he was, on May 19, 1965, ordered deported to Hong Kong (R. 23-24).

Subsequently, petitioner moved to reopen proceedings in order to apply under the refugee relief provisions of the October 1965 legislation which amended the Immigration and Nationality Act to accord priorities in the issuance of immigrant visas to various specified classes of aliens (Pub. Law 89-236, 79 Stat. 911). Specifically, he requested the opportunity to apply for adjustment of status under Section 203(a)(7) (8 U.S.C. 1153(a)(7))—a section which after providing, *inter alia*, for preference in the form of conditional entries for refugees from Communism, ends with the proviso:

> *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to the application for adjustment of status.

The motion was denied by the Immigration and Naturalization Service on the ground that petitioner was ineligible for adjustment of status under the

above proviso since Section 245 of the Act (8 U.S.C. 1255), which contains the provisions relating to adjustment of status, specifically excludes alien crewmen from its coverage. On petition for review to the United States Court of Appeals for the Ninth Circuit (see 8 U.S.C. 1105a), the order of denial was affirmed on March 28, 1967 (Pet. App. A; R. 49-52; reported at 375 F.2d 723). The court found it unnecessary to consider whether the reference to adjustment of status in Section 203(a)(7) was exclusively to the procedure and requirements of Section 245, since it found that Section 203(a)(7) did not in and of itself define a right to apply for adjustment of status and that petitioner could not bring himself within the provisions of any of the sections of the Act providing for such adjustment (Pet. App. A iv-v).

Basically, petitioner here contends that his eligibility for adjustment of status must be determined solely by the language of the proviso of Section 203(a)(7) without recourse to any other section of the Immigration and Nationality Act. As he acknowledges, this is essentially the same question which was before this Court last term in *Tai Mui* v. *Esperdy* and related cases, 371 F.2d 772 (C.A. 2), Nos. 1037, 1038, and 1090, 1966 Term, in which certiorari was denied April 24, 1967 (386 U.S. 1017). In those cases, the Second Circuit upheld the validity of regulations of the Attorney General interpreting the proviso of Section 203(a)(7) as referring to adjustment of status under Section 245 and thus making relief thereunder unavailable to alien crewmen. That court, addressing itself to the language and legislative history of the

proviso, concluded that Congress, in making available a limited number of preferential visas to refugees physically present in the country (in lieu of conditional entry preference), intended to accord the preference only to aliens who were entitled to have their status adjusted under existing law rather than to create a new category for the adjustment of the status of alien refugees. See 371 F.2d at 778-779. In support of the position that the section was not an independent and self-sustaining relief provision, the opinion of the Second Circuit, and respondents' memorandum in opposition to the petitions for certiorari in those cases, noted, *inter alia*, that the Senate Report on the 1965 legislation recited that it was contemplated that adjustments of status under the proviso would be made under Section 245 (S. Rep. No. 748, 89th Cong., 1st Sess., 22); that at the same time the section was added to the statutory scheme, Congress amended Section 244 (8 U.S.C. 1254) (relating to suspension of deportation) to make its benefits available to certain alien crewmen, while leaving the absolute ban as to crewmen intact in Section 245; and that it was unlikely, in view of congressional policy toward a class of persons thought to be guilty of frequent abuse of the immigration laws, that the enactment of Section 203(a)(7) was intended to make deserting crewmen indirectly eligible for preferred treatment.[1]

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[1] Petitioner's purported distinction between the procedural and substantive requirements of Section 245 (Pet. 8-9), in regard to its relationship to Section 203(a)(7), is, in view of

Such reasoning is just as applicable here as in these cases, and the factual situation is a substantially identical one. The basic position of the court below is the same as that of the Second Circuit, *i.e.*, that Section 203(a)(7) is not in and of itself an adjustment of status provision. Petitioner's attack on that interpretation presents no issue warranting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1967.

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the background, language, and legislative history of the latter provision, without merit. Petitioner's contention is essentially that the failure of Congress to specifically exclude alien crewmen from Section 203(a)(7) should be read as meaning that they are eligible for adjustment of status, even though they are expressly excluded from such relief by the adjustment of status provision, Section 245. In our view, by only the most tortured statutory construction can such a result be reached. Rather, the conclusion of the Second Circuit, which is wholly consistent with the holding of the court below, seems plainly reflective of the congressional intent.

APPENDIX

Statutes and Regulation Involved

Section 203(a)(7) of the Immigration and Nationality Act, as amended, 8 U.S.C. (Supp. I) 1153(a)(7), 79 Stat. 913, provides:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be

made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, provides:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
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8 Code of Federal Regulations 245.4, as amended, 31 Fed. Reg. 536 (January 15, 1966), provides:

> § 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.
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> The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pur-

suant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination.

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